

July 14, 2004

The Honorable Robert Bunda, President
and Members of the Senate
Twenty-Second State Legislature
State Capitol, Room 003
Honolulu, Hawaii 96813

Dear Mr. President and Members of the Senate:

Re: Senate Bill No. 1611, H.D. 2, C.D. 1

On July 13, 2004, Senate Bill No. 1611, entitled "Relating to the Deposit Beverage Container Program" became law without my signature, pursuant to Section 16 of Article III of the State Constitution.

The purpose of this bill is to amend Chapter 342G, Hawaii Revised Statutes, *Integrated Solid Waste Management*, Part VIII, *Deposit Beverage Container Program*. This bill makes substantive amendments to the Deposit Beverage Container Program. These amendments, or adjustments, are necessary to alleviate some of the obstacles to implementing the law. Among other things, this bill will exempt distributors who annually import or manufacture less than 100,000 deposit beverage containers per year from the onerous monthly reporting requirement currently mandated for all distributors. Small businesses will now have to submit reports to the department on a semi-annual basis and this will somewhat ease the burden on small businesses to comply with the law. Senate Bill No. 1611 extends the deadline for dealers to operate a redemption center at their place of business to July 1, 2005. This bill removes the requirement that redemption centers and reverse vending machines must crush or destroy all beverage containers and removes the quarterly reporting requirement for redemption centers. Simplifying the redemption process makes the program more convenient for consumers. Extending the timeline for retailers to comply with establishing redemption centers and relieving businesses of cumbersome reporting will make the program less burdensome for businesses. Senate Bill No. 1611 also clarifies requirements regarding labeling. These amendments increase the probability that deposit containers will be labeled properly by January 1, 2005. The Department of Health is required to provide sticker labels to businesses unable to comply with the labeling requirements before the deadline.

This bill raises four concerns. The first concern involves various deposit deadlines. The bill requires distributors to begin charging dealers and customers a deposit equal to the refund value of the container "...by January 1, 2005," [emphasis added]. Then the bill

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clarifies that the Department of Health "...**may**," [emphasis added] allow dealers to begin charging customers the refund value "...**beginning** November 1, 2004," [emphasis added] and requires the dealer to inform the customer that the deposits paid by the customer prior to January 1, 2005 shall not be redeemable until January 1, 2005. These dates raise two concerns. A distributor may charge dealers the deposit before November 1, 2004. However, the dealer will not be able to charge the consumer that deposit amount until November 1, 2004 at the earliest. Thus, dealers may bear the five cents per container cost for several months without being able to pass along this cost to the consumer.

Additionally, once dealers are allowed to charge consumers the deposit cost after November 1, 2004, the consumer cannot take the containers to a redemption center to receive a refund until after January 1, 2005. The consumer must hold the beverage containers for at least two months before obtaining the deposit refund. Since the customers are responsible for returning and obtaining the refund on the container, by not allowing the redemption for two months, the measure actually is a disincentive for consumers to recycle and redeem beverage containers. It would have been more prudent to operate and fund a consumer-friendly program that encourages and supports voluntary participation by the people of Hawaii, while not placing the weight of responsibility on businesses to ensure the success of the program.

Second, the bill specifies that accumulated funds in the Deposit Beverage Container Deposit Special Fund shall be retained in the fund unless determined by the auditor to be in excess. The bill requires the auditor to conduct management and financial audits of the fund in fiscal years 2005 and 2006 and every even numbered fiscal year thereafter. This action runs contrary to the Legislature's customary practice of determining excess amounts in special funds every year and lapsing the surplus aggregate to the general fund to balance their budget, regardless of auditor review. It is unclear whether the Legislature's intent is to maintain the solvency of the fund or to restrain my Administration from any flexibility in the use of the fund to implement the Deposit Beverage Container Program and ensure rational budgeting practices.

Third, the bill specifies procedures to be used by the Department of Health to implement and administer the Deposit Beverage Container Program and clarifies that the procedures are to be treated as rules of the department. While I have been advised that it is within the authority of the Legislature to incorporate proposed draft administrative rules into statute, it is extremely unusual and sets a disconcerting precedent. I recognize that this bill calls for the repeal of these administrative rules on March 1, 2005. However, Chapter 91, Hawaii Revised Statutes, Administrative Directive 99-02, and my October 10, 2003 memo to the Small Business Regulatory Review Board together form a comprehensive review process for proposed administrative rules that is transparent to the public and takes into consideration the impact of administrative rules on small business. All three of these steps were circumvented by the Legislature with the incorporation of administrative rules into this bill.

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The rules were placed into Senate Bill No. 1611 in the conference committee without community input and without a single public hearing.

Fourth, within the administrative rules included in this bill are penalties for non-compliance with the program. These penalties include up to a \$10,000 fine for each separate offense per day and allows for administrative, civil, or criminal actions to be taken in addition to the fines. The Deposit Beverage Container Program currently in law does not include any penalty provisions. These penalty provisions were placed into Senate Bill No. 1611 during the conference committee and were not discussed in the Legislature's public hearings prior to the passage of the final conference draft. Thus, community input on this rule was not gathered in a public hearing.

While I support efforts to engage our community in meaningful recycling efforts, a limited scope recycling program that addresses only 2% of Hawaii's solid waste while costing \$30 million in the first year of implementation will not make the difference Hawaii needs to reduce and eliminate litter. This single-purpose recycling program will only address beverage containers. A comprehensive statewide recycling program that addresses all forms of solid waste materials is a more competent course of action that will yield tangible results. The Legislature has the opportunity to consider statewide recycling programs in the next legislative session. In the meantime, this bill addresses some of the beverage industries' and the Department of Health's concerns regarding the implementation of the existing Deposit Beverage Container Program.

Therefore, I allowed Senate Bill No. 1611, H.D.2, C.D.1 to become law as Act 241, effective July 13, 2004, without my signature. While this bill is not the comprehensive recycling program I would prefer, the alternative would be to let Act 176, Session Laws Hawaii, 2002 take effect unamended. Act 176, as currently written, has numerous flaws and obstacles that had to be addressed before implementation could occur. This bill will address some of those flaws.

Sincerely,

LINDA LINGLE